# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN RE: CHANTIX (VARENICLINE) PRODUCTS LIABILITY LITIGATION

Master File No.: 2:09-CV-2039-IPJ

MDL No. 2092

This Order Relates To:

**ALL CASES** 

PRETRIAL ORDER NO. 9: SELECTION OF BELLWETHER PLAINTIFFS FOR DISCOVERY & TRIAL

Pursuant to Section IV.A.2 of PTO 4B, the parties hereby submit their joint proposal regarding the process for selecting a pool of initial cases eligible for case-specific discovery. This Order is the product of the parties' discussions over several months and applies to all cases currently pending in MDL No. 2092 and to all related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto (collectively, "these proceedings"). This Order is binding on all parties and their counsel in all cases currently pending or subsequently made a part of these proceedings and shall govern each case in the proceedings unless it explicitly states that it relates only to specific cases.

#### I. SCOPE OF ORDER.

- 1. <u>Intent of Order.</u> This Order is intended to establish procedures for selecting and conducting discovery of a subset of Plaintiffs<sup>1</sup> so that the Court and the parties may prepare these cases for early resolution (via motion, trial, settlement, or other resolution tool) in these proceedings, consistent with this Court's charge to promote the just and efficient conduct of the civil actions in these proceedings, to assure uniform and expeditious treatment in pretrial procedures, and to avoid undue delay or cost.
- 2. Order Does Not Constitute Determination Regarding Venue. Nothing in this order shall be construed to constitute a determination that venue is proper in this District in any case pending before the Court, nor shall it constitute consent by any party to have any case tried in this Court, except as provided herein.

## II. <u>SELECTION OF PLAINTIFFS FOR DISCOVERY POOL</u>.

- 3. Method for Selection of Discovery Pool.
- a. <u>Selection of Eligible Plaintiffs.</u> The initial pool of cases eligible for discovery ("the Discovery Pool") shall consist of twenty-eight (28) Plaintiffs, fourteen (14) of whom will be selected by Plaintiffs' counsel and the

<sup>&</sup>lt;sup>1</sup> For purposes of this Order, the term "Plaintiff" shall refer to an individual who took Chantix and allegedly suffered a personal injury or, if said individual is deceased, his/her estate (a "primary Plaintiff"). The term shall not apply to derivative Plaintiffs such as spouses asserting loss of consortium claims. The claims of such Plaintiffs, however, shall be subject to discovery and trial pursuant to this Order if the primary Plaintiff from whom such Plaintiffs' claims derive is selected for discovery and trial.

other fourteen (14) of whom will be selected by Pfizer's counsel. The only Plaintiffs eligible for selection for the Discovery Pool are Plaintiffs who: (a) have complaints pending in this MDL proceeding as of March 1, 2011; (b) served a substantially complete Plaintiff Fact Sheet, authorizations, and responsive documents by March 1, 2011; (c) named only Pfizer Inc as a defendant; and (d) allege solely a neuropsychiatric injury ("the Eligible Plaintiffs").

- b. <u>Allocation of Plaintiffs by Alleged Injury</u>. The selection referred to above shall be made from two groups: cases involving allegations of completed suicide or attempted suicide ("suicide/attempt cases"), and all other cases alleging neuropsychiatric injury ("other neuropsychiatric cases").
- c. <u>Eligible Plaintiffs List.</u> Before making their selections, the parties shall agree upon a list of all Plaintiffs that are Eligible Plaintiffs ("Eligible Plaintiffs List"). The Eligible Plaintiffs List shall identify the first and last name of each Plaintiff (in alphabetical order by last name, and then by first name where Plaintiffs have identical last names), the Plaintiff's case number, and the nature of each Plaintiff's primary injury (*i.e.*, suicide, attempted suicide, or other neuropsychiatric injury). Defendant shall provide Plaintiffs with Defendant's proposed Eligible Plaintiffs List by March 11, 2011, and Plaintiffs' counsel shall have until April 11, 2011 to assert any objection regarding any case Plaintiffs believe should be included in the list but was not included in Defendant's list; any

such objection shall be provided in writing to Defendant's Lead Counsel. In addition, the parties shall also have until April 11, 2011 to jointly agree to amend, or to resolve any disagreements about, the primary injury identified for any Plaintiff in the list. The parties shall present to the Court, and the Court shall resolve, any disagreements about the content of the Eligible Plaintiffs List by April 15, 2011.

- d. <u>Selection Process.</u> Plaintiffs' counsel shall select their fourteen cases as follows: (i) from the suicide/attempt cases, four (4) cases alleging actual suicide and three (3) cases alleging attempted suicide; and (ii) seven (7) cases from the other neuropsychiatric cases. Pfizer's counsel shall select their fourteen cases as follows: (i) from the suicide/attempt cases, four (4) cases alleging actual suicide and three (3) cases alleging attempted suicide; and (ii) seven (7) cases from the other neuropsychiatric cases. The parties will make their selections by June 1, 2011, through simultaneous exchange in a manner arranged by the parties.
- 4. <u>Limited Waiver of Lexecon.</u> Any Plaintiff in a case selected for the Discovery Pool who wishes to assert an objection under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), to his/her case being tried by this Court must do so in writing to Defendant's Lead Counsel by 5:00 p.m. CST on June 15, 2011. Plaintiffs who do not assert an objection by this time will be

deemed to have waived any rights under Lexecon and to have agreed to have his/her case tried by this Court. If an objection is asserted and Pfizer disputes that the objecting Plaintiff has a right to assert an objection under *Lexecon*, the parties shall present the issue to the Court for resolution immediately. If a Plaintiff successfully asserts an objection under Lexecon, then that Plaintiff's case shall be deemed immediately removed from the Discovery Pool, and within seven days thereafter Pfizer's counsel will select a replacement from the appropriate portion of the Eligible Plaintiffs List so that the Discovery Pool continues to consist of the number of Plaintiffs outlined in paragraph 3. Pfizer will waive its Lexecon rights, if any, for the eight (8) cases that the Court selects for inclusion in the Trial Pool, as specified in paragraph 16 below. After the trials of such Plaintiffs, any party wishing to assert a Lexecon objection to the trial of any other Plaintiff in the Discovery Pool may assert such objection. Any Lexecon objections other than for such Plaintiffs tried in this Court are preserved.

5. <u>Dismissals and Replacements</u>. Any Plaintiff selected for the Discovery Pool who wishes to dismiss his or her case must do so with prejudice. In the event of any dismissals, Pfizer shall select the replacement from the appropriate portion of the Eligible Plaintiffs List<sup>2</sup> so that the Discovery Pool

<sup>&</sup>lt;sup>2</sup> For example, if the first Plaintiff who dismissed his or her case alleged actual suicide as the primary injury, Pfizer would select a replacement Plaintiff from the portion of the Eligible Plaintiffs List consisting of allegedly completed suicides.

continues to consist of the number of Plaintiffs outlined in paragraph 3. However, if any Plaintiff in the Discovery Pool dismisses his or her case with prejudice after December 31, 2011, no replacement shall be selected so long as the Court determines there are adequate number of Plaintiffs remaining in the Discovery

III. DISCOVERY OF PLAINTIFFS IN DISCOVERY POOL.

Pool for the Court to make the final Trial Pool selections.

6. Master Written Discovery of Plaintiffs in Discovery Pool. Pfizer may

propound the master discovery permitted by Pretrial Order No. 4, paragraph II.C

within three days of a Plaintiff's selection for the Discovery Pool.

7. Amendments to Adoption of Master Complaint. For any Plaintiff

who filed a Master Short Form Complaint for Individual Claims ("Short Form

Complaint") adopting the Master Consolidated Complaint for Individual Claims

("Master Complaint"), within thirty days of such Plaintiff's selection for the

Discovery Pool, such Plaintiff must serve Defendants' Liaison Counsel with a

pleading: (a) specifying with particularity the factual basis for any claim involving

fraud, including Counts VII, VIII, and XII of the Master Complaint, as well as any

other state law claims alleging fraud or requiring pleading with particularity; and

(b) identifying any causes of action asserted in the Short Form Complaint which,

after further review of the applicable state law, Plaintiff no longer wishes to assert.

Pfizer shall have the right to file any appropriate Rule 12 motion in light of such pleading, but also may file a motion for judgment on the pleadings or motion for summary judgment at a later time.

8. Discovery Limitations. In connection with any individual Discovery Pool Plaintiff's case, absent agreement of the parties or a showing of good cause, the parties may take the depositions of a total of three (3) fact witnesses in completed suicide cases and four (4) fact witnesses in all other types of cases. The fact witnesses who may be deposed include only the following: the Plaintiff; Plaintiff's spouse and/or immediate family members; the Plaintiff's/decedent's prescribing physician(s); and/or the Plaintiff's/decedent's treating physicians or other health care providers. In connection with depositions of physicians or health care providers, in cases selected by Plaintiff's counsel, Defendant's counsel shall question first; and in cases selected by Defendant's counsel, Plaintiff's counsel shall question first. Nothing in this paragraph is intended to amend the permissible length of depositions as provided in PTO 4B. As to any case in the Discovery Pool that is later selected for inclusion in the Trial Pool pursuant to paragraph 16 below, the parties will meet and confer about any supplemental depositions requested by either party of witnesses who were deposed in the Discovery Pool pursuant to this paragraph.

9. <u>Discovery Commencement & Cut-Off.</u> Depositions of case-specific

fact witnesses may commence on July 1, 2011. Case-specific fact discovery for

Plaintiffs included in the Discovery Pool shall be completed by February 15, 2012,

with extensions granted only upon consent of Lead Counsel and/or on good cause

shown.

10. Scheduling. Absent extraordinary circumstances, counsel shall

consult in advance with opposing counsel (and, where applicable, proposed

deponents) in an effort to schedule case-specific depositions so that they go

forward at mutually convenient times and places.

11. <u>Notices Ten Business Days in Advance</u>. Absent agreement of counsel

or good cause shown, case-specific depositions (including any requests for

documents or subpoenas in connection with a deposition notice) shall be noticed at

least ten business days in advance.

12. Location. Absent agreement of counsel and the witness, or good

cause shown, case-specific depositions shall be noticed within 100 miles of the

deponent's residence or place of employment.

13. Incorporation of Other Pretrial Orders. The provisions of Pretrial

Order No. 4 relating to attendance (paragraph IV.H), objections (paragraph IV.K),

videotaped depositions (paragraph IV.M), the use of exhibits (paragraph IV.J &

IV.L), and transcripts (paragraphs IV.N, IV.O, & IV.P); as well as the provisions

PRETRIAL ORDER NO. 9 SELECTION OF PLAINTIFFS FOR BELLWETHER DISCOVERY & TRIAL of Pretrial Order No. 4B (paragraph IV.Q) are hereby incorporated by reference in their entirety and shall apply to case-specific depositions.

## IV. <u>DISPUTES REGARDING CASE-SPECIFIC DISCOVERY.</u>

- 14. <u>Cooperation</u>. Counsel are expected to cooperate and make good faith efforts to avoid involving the Court in any discovery disputes relating to casespecific discovery, including any disputes that arise during a deposition.
- 15. Procedure for Resolving Case-Specific Discovery Disputes. Where counsel have a dispute relating to case-specific discovery, which they cannot resolve with opposing counsel, they first must consult with their respective Lead Counsel. If Lead Counsel are not able to resolve the dispute, Lead Counsel shall meet and confer regarding a schedule and method (*i.e.*, a formal motion, letter briefs, oral argument, or informal discussion) for the parties to present the dispute to the Court. In no event shall any counsel other than Lead Counsel file a discovery motion with the Court absent consent of their respective Lead Counsel.

#### V. SELECTION OF PLAINTIFFS FOR TRIAL POOL.

16. <u>Selection of Individual Plaintiffs.</u> On February 29, 2012, the parties shall provide the Court with (a) a summary of the Discovery Pool cases, including key medical records, in a form to be determined after consultation with the Court, and (b) briefs from each side setting forth the parties' respective positions on

which cases are most representative of the then-existing docket. After consideration of those summaries and briefs, by March 15, 2012, the Court will select eight (8) individual Plaintiffs from the Discovery Pool to be eligible for trial ("the Trial Pool"). Four (4) of the Trial Pool cases will be from the suicide/attempt cases and four (4) will be from the other neuropsychiatric cases.

- 17. Selection of Cases for Initial Trials. When the Court selects the eight Trial Pool cases, the Court will designate two (2) of those cases that are suicide/attempt cases (one of which was suggested for inclusion in the Trial Pool by Plaintiff's counsel and one by Defendant's counsel) to be the first cases set for trial. The next two cases to be tried will be other neuropsychiatric cases (one of which was suggested for inclusion in the Trial Pool by Plaintiff's counsel and one by Defendant's counsel).
- 18. <u>Additional Case-Specific Discovery</u>. Upon receipt of the Court's selections, the parties shall conduct any additional depositions and discovery necessary in the two cases selected for the initial trials.<sup>3</sup> Fact discovery for the two cases shall be completed by May 15, 2012. Plaintiffs shall disclose their case-specific experts by May 15, 2012, Defendant shall disclose its case-specific experts

<sup>&</sup>lt;sup>3</sup> The discovery limitations in paragraph 8 shall not be construed to limit additional fact witness depositions for cases selected for the Trial Pool.

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by June 15, 2012, and case-specific expert discovery shall be completed by July

15, 2012.

19. Case-Specific *Daubert* and Other Motions. Motions seeking to limit

or exclude case-specific experts on Daubert or other grounds shall be filed by

August 1, 2012, with responses filed by August 15, 2012 and replies by August 20,

2012. The parties shall meet and confer regarding the schedule for other pretrial

deadlines and proceedings in the two cases, including the filing of case-specific

summary judgment motions, and the Court will enter such deadlines after

consultation with the parties.

20. <u>Single-Plaintiff Trials</u>. Any cases in the Trial Pool that ultimately are

tried shall be tried individually, with a single primary Plaintiff per trial.

21. First Two Trial Settings. The Court expects that the first trial will

commence on October 22, 2012, and that the second trial will commence on

January 22, 2013. Subsequent trial settings for additional Trial Pool cases will be

established by the Court, after consultation with the parties.

**DONE** and **ORDERED** this the 10<sup>th</sup> day of March, 2011.

INGE PRYTZ JOHNSON

U.S. DISTRICT JUDGE